REFERENCE TO COMMISSIONER IN CHANCERY.

By T. B. Benson.

§§ 51-56. Proceedings on Report.

(Continued from January Number.)

§ 51. Time of Hearing.—The Virginia Code provides that a cause may be heard upon a commissioner's report after it shall have been returned ten days.[66] The purpose of this provision is to prevent vexatious delays and to facilitate the hearing and decision of chancery causes.[67]

Ten Days before or during Term.—Ten days may have elapsed either before the commencement of the term or during the term.[68] A decree will not be reversed because the report is returned within ten days before commencement of the term at which it is acted on, unless it be shown to have been acted on within that period.[69]

In Hughes *v.* Harvey, 75 Va. 200, 205, it is said: "It is in-

66. Va. Code, § 6186. See Strange *v.* Strange, 76 Va. 240; Lancaster *v.* Barton, 92 Va. 615, 24 S. E. 251.

Under Former Statutes.—The statute passed March 9, 1836 (acts, 1835-36, ch. 44, § 1), provided "that after reports made by the commissioners appointed by the several courts of chancery in this commonwealth, to state and settle accounts to them referred, shall have been returned thirty days preceding any term, the cases shall be heard upon such reports, unless there be good cause shown to the contrary." It was under this act that Gray *v.* Dickinson, 4 Gratt. 87, was decided. Subsequently (at the revisal of 1849) the act was modified, so as to allow a cause to be heard upon a commissioner's report after it shall have been returned thirty days (omitting the words "preceding any term"), and if the report be under an order recommitting a former report, allowing the cause to be heard without waiting the thirty days. See Code of 1849, ch. 175, § 9, and also, Code of 1860, ch. 175, § 10. This section (10) was further amended December 22, 1870 (acts of 1870-71, pp. 9, 10), substituting "ten days" for "thirty days," and as thus amended the law stands at the present time. Code of 1873, ch. 171, § 10. Strange *v.* Strange, 76 Va. 240.

67. Hughes *v.* Harvey, 75 Va. 500.

68. Strange *v.* Strange, 76 Va. 240.

69. Moore *v.* Bruce, 85 Va. 139, 7 S. E. 195.

sisted that the court below erred in hearing the cause upon the report of a commissioner which had not been returned ten days preceding the term at which the decree was rendered. The case of Gray *v.* Dickenson, 4 Gratt. 87, relied upon by counsel to sustain this position, was based upon the peculiar phraseology of the act of March 9th, 1836. By the terms of that act it was required that a commissioner's report should be returned thirty days preceding the term at which the cause was heard. Acts of 1835-36, page 34. At the revisal of 1869 the law was changed in an important particular. The necessity of returning the commissioner's report before the commencement of the term was dispensed with, and by the act of 1870-1871 ten days were substituted for thirty. Code of 1873, ch. 171, § 10, p. 1105."

Report on Order of Recommittal.—If the report be under an order recommitting a former report, the cause may be heard without waiting the ten days.[70]

Report of Commissioner for Sale of Infants' Land.—If a case is referred to a commissioner merely to take evidence and report upon the propriety of a sale of infants' land, his report is not one which the Code requires to lie ten days before being acted upon.[71]

Effect of Premature Hearing.—Where a cause is heard upon the report of a commissioner which had not been returned for the legal period, the error should have been corrected by application to the court below, as the decree is merely interlocutory; and it is not ground for an appeal unless, upon application, the court below refuses to correct it.[72]

In West Virginia.—The West Virginia Code provides a cause may be heard upon a commissioner's report at any time after it is returned, and the court may, for good cause shown by any party interested, hear a cause on a commissioner's report returned after the commencement of the term of court at which

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70. Va. Code, § 6186. See Lancaster *v.* Barton, 92 Va. 615, 24 S. E. 251.

71. Lancaster *v.* Barton, 92 Va. 615, 24 S. E. 251

72. Armstrong *v.* Pitts, 13 Gratt. 235.

such hearing is desired to be had, but the court in this latter case may require the party desiring the hearing to give reasonable notice to the opposite party or to his attorney.[72a] And that any party may except to a commissioner's report at the first term of the court next after the term at which the same is filed; but, subject to such right to except, the cause may be heard upon such commissioner's report at any time after it is returned; and various interlocutory orders, such as an order of recommittal, may be entered at such hearing, but not a final decree confirming such report, except at the risk of the exercise of such right of exception within the time given by the statute.[73]

In Findley *v.* Smith, 42 W. Va. 299, 26 S. E. 370, it is said, "This puts it for all practical purposes where it was under the Code of 1849, when there were but two terms a year. A cause may be heard upon a commissioner's report at any time after it is returned by § 9, as it still stands modified by the later enactment. The appellant contends that this final decree entered at the first term after the report was returned was to his injury, and in violation of his right to except at the first term of the court next after the term at which the same was filed. The present meaning of § 7, as amended, and § 9, is that any party may except to such report at the first term at which the same is filed, and the cause may be heard upon a commissioner's report at any time after it is returned, subject to such power of exception at the first term of the court next after the term at which the same is filed; that is, exceptions may be considered and passed upon, the report may be recommitted with or without the exceptions, with or without special

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72a. W. Va. Code, § 4854. See Findley *v.* Smith, 42 W. Va. 299, 26 S. E. 370.

73. W. Va. Code, § 4852. See Findley *v.* Smith, 42 W. Va. 299, 26 S. E. 370.

Hearing Subject to Right to Except.—Under § 7, ch. 8, acts, 1895, if a decree is entered on a commissioner's report before the term next after the term at which the same was filed, such decree is so entered at the risk of a party excepting and showing error within the time given by statute. Kanawha Coal Co. *v.* Ballard, etc., Coal Co., 43 W. Va. 721, 29 S. E. 514.

directions, etc., provided no final decree is entered depriving any party of his right to except to such report at the first term of the court at which the same is filed; for it would be inconsistent with the principles and course of practice of the court to expressly permit any and all parties to except to the report after it has been confirmed by final decree. This is the only construction by which these two sections can be made to stand together without violating the general principles of equity practice. As it is, it will prove inconvenient and troublesome enough, without making it more so by giving the right to except to a report after it has been confirmed by final decree. For discussion of the law as it was before the amendment of 1895, see Kester *v.* Lyon, 40 W. Va. 161, 20 S. E. 933. If this view is correct, then the appellant, Joseph C. Smith, has shown that he had ground of exception which he was deprived of making within the time given by the statute, because the court, at the first term after the report was returned, confirmed it, and ordered a sale of his land."

§ 52. EXAMINING AND HEARING EVIDENCE.—It is now, in Virginia, the undoubted duty of the trial court to examine the evidence properly returned with the report; otherwise the Code provision that the evidence should be so returned would be to merely require the commissioner to do a lot of useless work.

Where exceptions have been filed to the commissioner's report, it is the province and duty of the court to examine the evidence and review the conclusions of its commissioner, provided the evidence on which his conclusions are based is returned with his report, or the proper steps are taken to put it before the court.[74]

Reference to Pleadings and Exhibits.—To show error on the face of a report, in the absence of such exceptions as bring before the court the evidence before the commissioner, recourse may be had to the pleadings and exhibits therewith, provided it be impossible that the alleged error could not have been affected by extrinsic evidence.[75]

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74. Shipman *v.* Fletcher, 91 Va. 473, 22 S. E. 458.

75. Kester *v.* Lyons, 40 W. Va. 161, 20 S. E. 933.

Hearing Additional Evidence.—If a cause has been referred to a commissioner, and ample opportunity has been given to both parties to introduce their witnesses, and the commissioner has made his report, and cause is ready for hearing, a deposition afterwards taken as to a controverted matter in the report ought generally to be disregarded by the court.[76]

§ 53. WEIGHT GIVEN REPORT.—When the commissioner has proceeded with the reference and made his report to the chancellor, what weight should the latter attach to it? This is a question solely for the chancellor to decide. He may confirm or reject it, in whole or in part, as he chooses. The report has no inherent weight. It is within his discretion to refer the matter in the first instance and within the same discretion to confirm or reject the report ultimately. It is to be borne in mind that the report is of no effect until confirmed.

From Bowers v. *Bowers to Shipman* v. *Fletcher.*—In Bowers *v.* Bowers, 29 Gratt. 697, it is said, "When a question of fact is referred to a commissioner, depending upon the testimony of witnesses, conflicting in their statements and differing in their recollection, the court must, of necessity, adopt his report, unless in a case of palpable error or mistake. * * * 'The commissioner is confronted with the witnesses; he sees their deportment, their manner of testifying, their capacity for recalling past occurrences, whereas the court, which only sees the testimony on paper, is denied these tests of accuracy and fidelity."

"The origin of the oft-repeated heretical views on this subject is traced to a mere side remark of Judge Staples in the case of Bowers' Adm'r *v.* Bowers et als., 29 Gratt. 697, 701, and it is a compliment more to the reputation of that eminent judge than it is to the discretion of those who have been led so far away by his casual observations. It was a long leap by the court when, in Stuart, Palmer & Co. *v.* Hendricks, 80 Va. 603, it declared, on the supposed authority of Bowers' Adm'r *v.* Bowers, that 'the principal is well established' that 'when a

76. Buster *v.* Holland, 27 W. Va. 510, 537; Richardson *v.* Duble, 33 Gratt. 730.

question of fact is referred to a commissioner, depending upon the testimony of witnesses, conflicting in their statements and differing in their recollections, the court must, of necessity, adopt his report, unless in a case of palpable error or mistake.' This has been repeated in Virginia with more or less emphasis in the cases of Stimpson *v.* Bishop et als., 82 Va. 190, 204; Magarity *v.* Shipman, Id. 784, 787; Jones *v.* Degge, 84 Va. 685; Porter *v.* Young, 85 Va. 49, 54; Robinson *v.* Allen, 85 Va. 721, 727, and Bowden *v.* Parrish, 86 Va. 67, 69. In Porter *v.* Christian, 88 Va. 733, the court seems to go a step further when it declares that 'there is no safe method by which this court can decide between conflicting statements seen on paper.'" "The best argument for a law which should permit the courts thus to delegate their functions—that the commissioner was like a jury, and seeing the witness and marking his very manner and complexion, was best able to draw correct conclusions from the evidence—altogether begs the question as an argument that the commissioner has in fact such a function. Judge Riely disposes of the whole subject by two suggestions, which (boiled down) are as follows: (1) The same weight is not to be allowed to a commissioner as to a jury, because, under the law, the jury are the triers of fact and the commissioner is not; (2) There is no sort of authority for the court thus to delegate its functions. This learned judge expresses the conclusion of the court, and the rule for the present and future, in the two following sentences: 'When, therefore, the commissioner has seen and examined the witnesses, and the testimony is conflicting, and his conclusions are clearly supported by competent and unimpeached witnesses, the court will not set aside or disturb his report, unless the weight of the testimony which is contrary to his conclusions is such, on account of the number of witnesses and the nature of the evidence, as to make it clear that the commissioner has erred.' And, 'but even in such case the court will review and weigh the evidence, and if not satisfied that the commissioner has reached a right conclusion, will overrule his finding.' As the last sentence covers the whole ground and means that in all cases, even where the commissioner has seen the witnesses, the court will review and weigh

the evidence and will disregard the finding of the commissioner if it does not agree with it, it is rather to be regretted that the court did not content itself with the latter of the two sentences quoted and wholly omit the first qualifying and excusing declaration. Inasmuch as we have at last returned to first and evidently correct principles, a review of the cases holding to the other rule may not be practically profitable, but I think it will be at least interesting in the abstract to observe how the courts have climbed this ladder, getting by round after round higher and higher away from the truth, and evidencing, by the exact reverse of motion, the maxim facilis descensus averni." [77]

In Shipman *v.* Fletcher, 91 Va. 473, 22 S. E. 458, it is said, "Commissioners in chancery are appointed to assist the chancellor and to relieve him in a large measure of these and other duties incidental to the progress and determination of the cause. For this reason they have been aptly termed the 'arms of the court.' But from the very necessity of their appointment and the nature of their office, their work is subject to the review of the court. It may accept it or reject it, in whole or in part, as its judgment, upon such review, may dictate, whether it be of law or fact. Commissioners are to assist the court, not to supplant it. There is a wide difference between the trial and decision of a suit in equity and of an action at law. In the former, the court finds and decides upon both the facts and the law; while in the latter the jury are the triers of the facts, and the court expounds the law. There is no proper likeness between the report of a commissioner upon matters of fact, and the verdict of a jury. In an action at law, jurors are, under the law, the judges of the facts, and where the testimony is conflicting their verdict is conclusive. They are not in any sense the agents or assistants of a court of law, but perform within their appointed sphere a principal function of judicial trial. The court has a limited revisory power over their action, and may, within certain limits, set aside their verdict and award a new trial, but cannot find the facts. The facts are within the domain of the jury, and the court may not entrench upon it. But not so with the commissioners of a court of equity. They

77. 1 Va. Law Reg. 485, 486.

are its assistants, and their work is subject to the absolute review of the power they are appointed to assist. A court of equity cannot abdicate its authority or powers, nor confide nor surrender absolutely to any one the performance of any of its judicial functions. It may rightfully avail itself of the eyes and arms of his assistants in the proper preparation for judicial determination of the many complicated, difficult, and intricate matters upon which its judgment is invoked, but in it resides the authority, and to it solely belongs the responsibility, to adjudicate them. In it remains the right to form its own conclusions from the results laid before it by its commissioners, and to pronounce its own judgments. Their entire work is subject to its review, consideration, and judgment, and it is in no wise precluded from doing so by their findings or conclusions. There is no propriety, therefore, as is frequently claimed should be done, in holding, that, where the evidence is conflicting, the report of a commissioner in chancery is entitled to the same weight and should be given the same effect as the verdict of a jury."

Has Not Weight of Verdict.—The Virginia Code provides "the report shall not have the weight given to the verdict of a jury on conflicting evidence, but the court shall confirm or reject such report in whole or in part, according to the view which it entertains of the law and the evidence."[78]

And in West Virginia it has been held that the finding of a commissioner in chancery on a question of fact has not the force of the verdict of a jury in a law case, nor on an issue out of chancery; and that, though entitled to peculiar weight, the chancellor, if dissatisfied with it, may set it aside on exception and adopt his conclusion as to what the evidence proves.[79]

Why the report of a commissioner should ever have been likened to the verdict of a jury is inconceivable. There is absolutely no basis of comparison. A commissioner does not function as a jury. The jurors are tryors, the commissioner is not. The great distinction between the two is this, a jury is given separate powers and acts in a field of its own, distinct from the

78. Va. Code, § 6179.
79. State *v.* King, 64 W. Va. 546, 63 S. E. 468.

court. This the court cannot invade. We have seen fit to put this in our constitution, our most cherished institution, while the commissioner is a mere helper of the chancellor assisting in the same field. His acts are the chancellors' while the jury's are its own.

Presumption in Favor of Report.—It has been stated, in effect, in both Virginia and West Virginia that every presumption is in favor of the correctness of the decision of the commissioner, and it is not usual to reject his findings, unless, upon examination, such findings are found to be unsupported or defective in some essential particular.[80]

It is true that there is a presumption in favor of the correctness of the commissioner's report, but this presumption is in no sense conclusive nor has the chancellor the right to rely on it. It might be stated that a commissioner, like any other person, is presumed to discharge his duties correctly. But there is no presumption which should have any weight with the chancellor. It would be a neglect of duty for a chancellor to accept a report of a commissioner because he presumed it was correct.

In Hartman *v.* Evans, 38 W. Va. 669, 18 S. E. 813, it is said, "A good commissioner is the right arm of the court, and his services are indispensable to the due administration of justice in cases like this. The investigations and conclusions of a man of sense and experience as a commissioner have been found to be entitled to great weight. Hence the reason of the rule that every presumption is in favor of the correctness of the decision of a master, and it is not usual to reject his findings, unless, upon examination, such findings are found to be unsupported or defective in some essential particular." [81]

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80. See Shipman *v.* Fletcher, 91 Va. 473, 22 S. E. 458; Maddock *v.* Skinker, 93 Va. 479, 25 S. E. 535.

Where a report of partition made by commissioners is proper on its face, every reasonable presumption is in favor of its fairness. Cross *v.* Cross, 56 W. Va. 185, 49 S. E. 129.

The report of a commissioner, unless excepted to in time, will be presumed to be correct, not only as to the principles of the account, but as to the evidence also. Lehman *v.* Hinton, 44 W. Va. 1, 29 S. E. 984.

81. "This might be very well if the court was always quite sure

A commissioner's report, made in a cause rightly referred, on the face of which no error appeared, will be presumed by the court as admitted to be correct by the parties, not only so far as it settles the principles of the account, but also in regard to the sufficiency of the evidence upon which it is founded, except in so far, and as to such parts thereof, as may be objected to by proper exceptions taken thereto before the hearing, and the court at the hearing is bound to observe this rule of equity practice. And it is error for the court at the hearing to remodel and restate the whole account stated in such report, and enter a decree on its own statement, without reference to the account stated by the commissioner, or the action of the parties in excepting or not excepting thereto.[82]

Taken as Prima Facie Correct.—While the court, as to the report of its commissioners, possesses the absolute power of review, it is the practice to accept the report as prima facie correct[83] and to adopt it, unless there is dissatisfaction with the report, and dissatisfaction is expressed in the form of exception filed thereto.

Findings of Fact on Conflicting Evidence.—A number of Virginia and West Virginia decisions state the rule to be that where questions purely of fact are referred to a commissioner to be reported on, his findings will be given great weight, though not as conclusive as the verdict of a jury, and should be sustained

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that the commissioner was not only a 'man of sense and experience,' but of more sense and experience than the judges on the bench." 1 Va. Law Reg. 485, 488.

82. Poling *v.* Huffman, 48 W. Va. 639, 37 S. E. 526; Ward *v.* Ward, 21 W. Va. 262; Baltimore, etc., R. Co. *v.* Vandewerker, 44 W. Va. 229, 28 S. E. 829.

83. Shipman *v.* Fletcher, 91 Va. 473, 22 S. E. 458; Cralle *v.* Cralle, 84 Va. 198, 6 S. E. 12; Maddock *v.* Skinker, 93 Va. 479, 25 S. E. 535.

Commissioner's report is conclusive as to any fact he is directed to ascertain, in absence of proof to the contrary. Corey *v.* Moore, 86 Va. 721, 11 S. E. 114.

Facts accepted as fully established unless excepted to. Righter *v.* Riley, 42 W. Va. 633, 26 S. E. 357.

unless it plainly appears that they are contrary to law, or are not warranted by any reasonable view of the evidence.[84]

In a leading article in 1 Va. Law Reg. 485, 487, it is said, "As early as the case of Boyd & Co. *v.* Gunnison & Co., 14 W. Va. 1, that court declared that 'it is a well settled rule of law that when questions of fact are submitted to a commissioner his findings upon such facts should be sustained, unless the court is fully satisfied from the evidence that such findings are erroneous.' Thus moderately put, the rule is approved by Judge Snyder in Graham *v.* Graham, 21 W. Va. 702. In Handy *v.* Scott, 26 W. Va. 710, 718, and in Rogers *v.* O'Niel, 33 W. Va. 159, 165, this rule is again approved, but in the case of Fry *v.* Feamster, 36 W. Va. 465, the Court of Appeals of West Virginia makes clear a considerable difference between the length which that court was willing to go in favor of the views of the commissioner and the rule which has obtained in Virginia, when it says: 'This court has several times held that, where questions purely of fact are referred to a commissioner, his findings will be given great weight, though not as conclusive as the verdict of a jury, and should be sustained, unless plainly not warranted by any reasonable view of the evidence.' But this is much beyond what obtained with the courts before the intervention of the later cases, and very much more than is sanctioned by the decision of the Court of Appeals of Virginia in the case of Shipman *v.* Fletcher. In Hulings *v.* Hulings Lumber Co., 18 S. E. 627, the Court of Appeals of West Virginia evinces a disposition to retreat somewhat from the advanced position taken in Fry *v.* Feamster; for it says: 'If the testimony is conflicting, the court will rarely interfere with the master's decision on the facts, provided he made no errors of law which affected the result.'"

Where Evidence Consists of Depositions.—Where, as was said by Judge Whittle in delivering the opinion of the court in Lush *v.* Pelter & Co., 101 Va. 790, 798, 45 S. E. 333, "evidence

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84. Bowers *v.* Bowers, 29 Gratt. 697; Tatum *v.* Tatum, 101 Va. 77, 43 S. E. 184; Fry *v.* Feamster, 36 W. Va. 454, 15 S. E. 253. See also Girard Life Ins. Co. *v.* Cooper, 162 U. S. 529, 16 S. Ct. 879, 40 L. Ed. 1062.

consists of the depositions of witnesses, and they are taken by the commissioner or in his presence, he has the advantage of noting the demeanor of the witnesses, their intelligence and man ner of testifying, which is of importance in judging of their credibility and weighing their evidence; the findings of a commissioner upon a question of fact will not, as a rule, be disturbed when the evidence is conflicting." [85]

The findings of fact of a commissioner in chancery, based on depositions taken by him or in his presence, if clearly supported by competent and unimpeached witnesses will not be disturbed unless clearly against the weight of the evidence. But even in such case, the court will review and weigh the evidence, and if not satisfied with the findings of the commissioner will overrule them.[86]

In Shipman *v.* Fletcher, 91 Va. 473, 22 S. E. 458 it is said, "The court is presumed to be more competent to pass upon the evidence and draw correct conclusions from it than the commissioner. Where the testimony of the witnesses is not taken by the commissioner or in his presence, the same avenues to the truth and to the right are open to the court as to the commissioner. All the evidence is in writing, and the court, by special training, learning, and experience, is better qualified to analyze, discriminate, and weigh it, and draw correct conclusions from it, than the commissioner, who is frequently neither a lawyer, nor a skilled accountant."

Report in Action at Law.—A report of account by a commissioner in an action at law, whether excepted to or not, is prima facie in its findings, but not conclusive, and may be repelled by evidence at the trial.[87]

A special commissioner appointed by the court with consent of the parties is not an arbitrator, but his report is subject to review by the court as in the case of a general commission.[88]

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85. See also Shipman *v.* Fletcher, 91 Va. 473, 479, 22 S. E. 458; Taylor *v.* McDonald, 100 Va. 487, 41 S. E. 946; Smiley *v.* Smiley, 112 Va. 490, 493, 71 S. E. 532.

86. Tatum *v.* Tatum, 101 Va. 77, 43 S. E. 184.

87. State *v.* Barnes, 52 W. Va. 85, 43 S. E. 131.

88. Crislip *v.* Cain, 19 W. Va. 438.

After Confirmation.—When a commissioner's report is confirmed it is merged in the decree of confirmation, and so becomes a verity of record, and must so stand until assailed by some legally prescribed method.[89] It is conclusive, in the absence of proof to the contrary, as to any fact which he is directed to ascertain, and is not open to exceptions direct after it has been confirmed, for then it is locked up in the decree of confirmation, and can only be reached, if it be an interlocutory decree, by a petition to rehear the decree, and if the rehearing be granted, then the account and report will be open for exceptions.[90]

It is error for the circuit court, after confirming a commissioner's report without exception thereto, to change the priorities of the liens as ascertained and determined by such report, no error of law appearing on the face thereof.[91]

On Appeal.—On appeal, it has been held, the finding of the commissioner will be regarded merely as a circumstance, of more or less weight, to be considered with the evidence, in testing the correctness of the finding of the court.[92] The appellate court will not disturb the finding of a commissioner on items of accounting between partners on pure questions of fact, where it appears that the commissioner has made a careful and painstaking investigation of every item of dispute, and his findings are well justified by the evidence.[93]

In Allen *v.* Maxwell, 59 W. Va. 227, 236, 49 S. E. 242, it is said, "The commissioner having passed upon the facts referred to him, 'his findings will be given great weight, though not as conclusive as the verdict of a jury, and should be sustained unless plainly not warranted by the evidence. This rule operates with peculiar force in an appellate court when the findings of a commissioner have been approved by the court below.' "

In Wolfe *v.* Morgan, 61 W. Va. 287, 289, 56 S. E. 504, it is said, "Where a decree or finding of a commissioner is based on

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89. Nelson *v.* Kownslar, 79 Va. 468.
90. Corey *v.* Moore, 86 Va. 721, 11 S. E. 114.
91. First Nat. Bank *v.* Simms, 49 W. Va. 442, 38 S. E. 525.
92. State *v.* King, 64 W. Va. 546, 63 S. E. 468.
93. Dixon *v.* Paddock, 104 Va. 387, 51 S. E. 841.

depositions conflicting, on which different persons might reasonably disagree as to the facts proved, or the proper conclusion therefrom, the appellate court will decline to reverse the chancellor, although the testimony might be such that the appellate court might have pronounced a different decree, if deciding the case in the first instance."

Where the evidence is conflicting, the findings of a commissioner in chancery on a question of fact approved by the trial court, will not be disturbed on appeal unless they are clearly wrong.[94] Where the evidence is returned with a commissioner's report, the supreme court will review and weigh it, and, if not satisfied that the commissioner has reached a right conclusion, will overrule his finding or findings, but, except as to errors apparent on its face, the report is prima facie correct, and where the evidence is conflicting, the supreme court will not reverse the action of the trial court overruling an exception to the report and confirming it, unless the finding of the commissioner is clearly erroneous.[95] In Alexander *v.* Critcher (Va.), 94 S. E. 335, 339, it is said, "A commissioner's report, made upon conflicting evidence and approved by the trial court, will not be disturbed on appeal unless the error complained of is palpable." [96]

Where a case has been properly referred, and the commissioner's report and findings of fact have been overruled by the court below, the supreme court will determine for itself from the evidence whether it will sustain the conclusions of the commissioner or that of the court.[97]

§ 54. CONFIRMATION—*Premature.*—An order of confirmation made prior to the time allowed for the filing of exceptions is premature and should be set aside.[98]

Without Passing on Exceptions.—The confirmation of the report of a commissioner in chancery, without formally passing

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94. Virginia, etc., R. Co. *v.* Heninger, 110 Va. 301, 67 S. E. 185.

95. Howard *v.* Gose, 112 Va. 552, 72 S. E. 140.

96. See also Cattrell *v.* Mathews, 120 Va. 847, 92 S. E. 808.

97. Roots *v.* Kilbreth, 32 W. Va. 585, 591, 9 S. E. 927; Deepwater R. Co. *v.* Honaker, 66 W. Va. 136, 147, 66 S. E. 104.

98. See Tindal *v.* Tindal, 1 S. C. 111.

on the exceptions thereto; is harmless error, unless the court ought to have sustained the exceptions and rendered a decree in favor of the exceptant.[99]

Order Is Interlocutory.—An order of confirmation is interlocutory only and may be set aside or remodeled.[1] It is well settled that whether an interlocutory decree confirming a commissioner's report shall be modified or wholly set aside, or not, is generally a matter resting in the sound discretion of the chancellor, to be exercised according to the particular circumstances of each case.[2]

§ 55. RECOMMITTAL.—If the chancellor does not approve of the report of the commissioner, he can dispose of it in either of two manners; he may (1) recommit it to the commissioner for further evidence, inquiry or finding or (2) correct or remodel it himself without further assistance from the commissioner. Where, upon consideration of the bill, answer, and other pleadings in connection with the report of a commissioner in chancery, an error becomes apparent, the circuit court may correct it on motion, without an exception, or may recommit for further investigation.[3]

Recommittal amounts merely to sending the report back to the commissioner for a second reference, in order to properly perform the duties demanded of him in the first instance.

Grounds for Recommittal.—A report may be recommitted (1) where the commissioner has failed to state or inquire into all accounts and matters referred to him, (2) has failed to take and hear evidence as to matters of inquiry, (3) has exceeded his authority under the order of reference, or (4) where there is some defect in the report itself.

For Failure to Make Inquiry.—A commissioner's report may

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99. Bissell *v.* Hood, 101 Va. 452, 44 S. E. 705.

1. Huntington, etc., Bank *v.* Simms, 49 W. Va. 442, 38 S. E. 525.

2. Kendrick *v.* Whitney, 28 Gratt. 646; Fultz *v.* Brightwell, 77 Va. 742; Newberry *v.* Stuart, 86 Va. 965, 11 S. E. 880; Armstrong *v.* Pitts, 13 Gratt. 235; Wooding *v.* Bradley, 76 Va. 614; Nelson *v.* Kownslar, 79 Va. 468.

3. Reed *v.* Nixon, 36 W. Va. 681, 15 S. E. 416.

be recommitted for his failure to find facts referred to him.[4] Though the pleadings do not show that the transactions sought to be settled and adjusted, arose out of a partnership for gambling, yet if this appears from the evidence taken before the commissioner who was directed to settle the accounts, it is proper for the court to recommit the accounts, and direct an inquiry into the consideration on which the claims of the parties are founded.[5]

Failure to Hear Evidence.—Where an exception to a commissioner's report is correctly sustained by the court, upon the evidence produced, yet if there is good reason to believe that other evidence might be produced, to give the case a different result, and that such evidence has been withheld in consequence of the commissioner's having allowed the item the court of chancery ought not to pronounce a final decree, but to recommit the account for farther evidence and inquiry.[6]

In a suit by distributees against an administrator, the accounts having been referred, a report is returned before the defendant's evidence is filed. He excepts to the report, and files an affidavit showing a sufficient excuse for not sooner taking his evidence, and asks for a recommitment of the report. Under these circumstances, though the testimony may sustain the defendant as to the subject of controversy, it would not be proper to dismiss the bill; but the plaintiff should have an opportunity to disprove the testimony, and is also entitled to an account of administration. The report should be recommitted.[7]

For Failure to Report Matter.—Where a reference directs the commissioner to report upon a matter, and he does not, the court should recommit the report, without exception.[8]

If a commissioner fails entirely to make any report with reference to a matter referred to him, the court should refer this

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4. Crim *v.* Post, 41 W. Va. 397, 23 S. E. 613.

5. Watson *v.* Fletcher, 7 Gratt. 1.

6. Williams *v.* Donaghe, 1 Rand. 300; Holt *v.* Taylor, 43 W. Va. 153, 27 S. E. 320.

7. Thomas *v.* Dawson, 9 Gratt. 531.

8. King *v.* Burdett, 44 W. Va. 561, 29 S. E. 1010; Shipman *v.* Fletcher, 83 Va. 349, 2 S. E. 198; White *v.* Drew, 9 W. Va. 695; Bank *v.* Wilson, 25 W. Va. 242; Jones *v.* Byrne, 94 Va. 751, 27 S. E. 591.

matter to him again, to be reported upon, and this should be done though no one except to such report. No one's right can be regarded as abandoned or prejudiced by his failure to except to such report because of such failure.[9]

If a commissioner inadvertently omits from his report a debt properly proved before him, and he discovers the omission after he has returned his report, and without special authority to do so he makes a supplemental report showing the existence and the proof of such debt, which is excepted to for that cause, the court should recommit the report to the commissioner, that such debt may be properly reported.[10]

For Failure to Return Evidence.—Under the provision of the Virginia Code requiring the evidence upon which it is based to be returned with the commissioner's report, his failure to comply therewith would afford a proper ground for a recommittal of the report to him.

For Failure to Conform to Order.—A commissioner must not go beyond the matter referred to him, and if he does so his report so far as it refers to that matter is a nullity. It has been decided that in such a case the proper course is not to except to the master's report, but, before it is confirmed, to apply to the court that it may be referred back to the commissioner to review his report, but that, if no such application is made, and the report should be affirmed, the court will pay no attention to it, except so far as it is warranted by the decree.[11]

Report Filed While Cause Dismissed.—A report made while a cause stood dismissed and before it was reinstated, should be recommitted.[12]

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9. Childs *v.* Hurd, 32 W. Va. 66, 9 S. E. 362.

An exception to a report of liens on property which brings to the attention of the court that the commissioner has failed to report facts appearing of record in the clerk's office of said court, and which are essential to an adjudication of the rights of the exceptor, should not be overruled, but the report should be recommitted to the commissioner to make inquiry and report as to the alleged facts set out in the exception. Jones *v.* Byrne, 94 Va. 751, 27 S. E. 591.

10. Kanawha Valley Bank *v.* Wilson, 25 W. Va. 242.

11. Ware *v.* Starkey, 80 Va. 191; White *v.* Drew, 9 W. Va. 695.

12. Williamson *v.* Childress, 4 Hen. & M. 449.

Where Exceptions Sustained.—Where numerous exceptions are sustained to the report, it should be recommitted to be reformed in accordance with the rulings of the court.

In Holt *v.* Holt, 46 W. Va. 397, 35 S. E. 19, it is said, "It is not proper to permit either of the litigants without notice to file a supplemental and reformed report, and base a decree thereon. The court in this instance seems to have plainly ignored the report of the commissioner, and, while making it appear on the face of the decree, that it had passed on the exception generally, it founds the same on a statement furnished by the plaintiffs without the knowledge of the defendants. This is undoubtedly an unjustifiable way to proceed in a case of this character. If the court was dissatisfied with the commissioner's report, it should have recommitted it, with instructions, to the same or another commissioner.

Death of Party.—When the principal defendant in a chancery cause dies, and the same is revived against his administrator, heirs, sureties, creditors, grantees, and donees, and converted into a general creditors' bill for the purpose of settling the estate of such decedent, an unconfirmed commissioner's report, to which numerous exceptions have been filed, cannot be confirmed against the objection of any of such new and interested parties to the suit, but the same should be recommitted anew without regard to such unconfirmed report.[13]

Where No Exceptions Filed.—If in any case the court is not satisfied with the report of a commissioner in regard to matters not excepted to which might be affected by evidence aliunde, instead of remodeling the account on its own estimate of the evidence, it should recommit the report, with instructions indicating its opinion, so that the respective parties might have an opportunity of meeting any objection thus suggested.[14]

Where Nothing to Be Gained by Recommittal.—It is not error to refuse to recommit an account to a commissioner to be

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13. Holt *v.* Holt, 46 W. Va. 397, 35 S. E. 19.

14. Baltimore, etc., R. Co. *v.* Vanderwerker, 44 W. Va. 229, 28 S. E. 829; Ward *v.* Ward, 21 W. Va. 262; Poling *v.* Huffman, 48 W. Va. 639, 37 S. E. 526.

stated more in detail and by items, where the commissioner states in his report that he has been unable to do this from all the evidence before him, and it does not appear that a more detailed statement of the account could have been made, or that anything could have been gained by the recommittal.[15]

Decree for Recommittal.—The matter is recommitted to the commissioner by a decree of the chancellor. When a chancery cause is remanded, with directions that a reference shall be made to the commissioner, this will not warrant him in acting on the matter without the order of the chancellor, and it is error to confirm his report made without an order.[16] A decree which sustains certain exceptions to a commissioner's report, and recommits the cause to the same or another commissioner, is not an appealable decree.[17]

Costs of Recommitment.—If, on account of the commissioner's negligence or misconduct, a report be recommitted, he shall bear the costs occasioned thereby.[18]

When Exceptions to Second Report.—When a cause has been referred to a commissioner of the court, to ascertain certain facts, at the instance of the plaintiff and appellant, with a subsequent order recommitting the report made, upon the coming in of said second report, which approves and adopts the first report made, it is no error in the court to overrule exceptions taken to said second report, when it appears to the court that the exceptions are based upon a misapprehension of the facts disclosed in the case; and especially so when the facts reported —and clearly right—not only justify, but require, the exceptions to be overruled and the report to be confirmed.[19]

Correction without Recommittal.—Where a commissioner's report shows, that interest on a debt audited therein is calculated at six per cent, and the pleadings in the cause show, that the debt bore nine per cent interest, and the report is not ex-

15. Howard *v.* Gose, 112 Va. 552, 72 S. E. 140.
16. Keenon *v.* Strange, 12 Ala. 290.
17. Hooper *v.* Hooper, 29 W. Va. 276, 1 S. E. 280.
18. Va. Code 1904, § 3324; W. Va. Code 1899, ch. 129, § 8.
19. Jackson *v.* Jones, 9 W. Va. 1.

cepted to, such error may be corrected in the court below on notice under the statute or by bill of review or by petition for rehearing in a proper case, or upon appeal in the appellate court.[20]

In Whitten *v.* McDermitt, — W. Va. —, 97 S. E. 585, 589, it is said, "Ordinarily, where errors are discovered in a settlement made between the parties, which can easily be corrected by the court, and do not involve a recasting of the account, and are certain and definite in their extent, the court will simply enter a decree correcting such errors; but where errors are discovered, to correct which would involve recasting the accounts between the parties, as well as complicated calculation, ordinarily the matters will be referred to a commissioner to examine the accounts, and, taking the settlements made as prima facie correct, correct them, in order that the exact status of the affairs between the parties may be ascertained and a binding decree entered thereon. This is the course we think should have been pursued in this case."

§ 56. PROCEEDINGS ON APPEAL.—An order referring a cause to a commissioner in chancery to make an account is, in general, interlocutory and not an appealable decree.[21] The same is true of an order confirming the report. An order of reference, founded on the expressed opinion of the judge, not followed by the sentence of the law thereon, is not appealable.[22]

Presumptions on Appeal.—The proceedings on reference will be considered regular on appeal.[23] A decree confirming the finding of a commissioner's report and decreeing in accordance therewith, carries with it the presumption of correctness and will not be reversed, unless plainly wrong.[24] A commissioner's report, purporting to be made in obedience to an order of the court, and the court having made the report the basis of its decree, and there not appearing to have been any question of the

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20. Shenandoah Val. Nat. Bank *v.* Shirley, 26 W. Va. 563.
21. Kanawha Lodge *v.* Swann, 37 W. Va. 176, 16 S. E. 462.
22. Hill *v.* Cronin, 56 W. Va. 174, 49 S. E. 132.
23. Coffman *v.* Sangston, 21 Gratt. 263.
24. Pickens *v.* Daniels, 58 W. Va. 327, 52 S. E. 215.

commissioner's authority in the court below, the appellate court must presume that it was made by proper authority, though no order of account is in the record.[25]

Where Findings of Commissioner Disapproved.—Where questions of fact are referred to and passed upon by a commissioner, and the findings of the commissioner are overruled and disaffirmed by the circuit court, the appellate court must determine for itself, from the facts and circumstances disclosed by the record, whether it will sustain the conclusion of the commissioner or the circuit court.[26]

Review of Evidence.—Where a commissioner's report is confirmed without exception, the appellate court will not look into the evidence on which it is founded or by which it might be affected, but will accept the findings of such commissioner as to all facts depending on extrinsic evidence as final and conclusive.[27] Where a cause has been referred to a commissioner to ascertain and report the debts due from a decedent, and he returns with his report as part thereof, all the evidence, which was before him, on which he acted, and the report is excepted to as unsupported by the evidence, and the circuit court has overruled said exceptions and confirmed the report, the appellate court will review the evidence.[28]

An appeal by one party from a decree overruling some exceptions to commissioner's report, and sustaining others, and recommitting the report, brings up the whole cause; and the decree of the court of appeals affirming the decree of the court below, concludes all questions previously decided, whether in favor of the appellants or appellees.[29]

Remand for Correction of Errors.—When a commissioner to whom a cause is referred to settle large and intricate matters

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25. Wills *v.* Dunn, 5 Gratt. 384.

26. Roots *v.* Kilbreth, 32 W. Va. 585, 9 S. E. 927; Graham *v.* Graham, 21 W. Va. 698; Hyre *v.* Lambert, 45 W. Va. 715, 31 S. E. 927.

27. Long *v.* Willis, 50 W. Va. 341, 40 S. E. 340. See also Campbell *v.* White, 14 W. Va. 122; Poindexter *v.* Green, 6 Leigh 504.

28. Broderick *v.* Broderick, 28 W. Va. 378; McClanahan *v.* McClanahan, 36 W. Va. 34, 14 S. E. 419.

29. Burton *v.* Brown, 22 Gratt. 1, 15.

of account, containing many contested items, returns a report showing only an aggregation of items in accordance with his conclusions, and the report is excepted to for this reason, and the circuit court overrules such exceptions and confirms the report on appeal, the appellate court will reverse the decree of confirmation, and remand the cause, that a proper itemized statement of such accounts may be made.[30] When a circuit court wholly disregards a commissioner's report, and numerous exceptions thereto, and enters a decree on an entirely different basis from that presented in such report, and the appellate court, on appeal, reverses such decree, it will remand the cause to the circuit court with directions to pass upon and dispose of such exceptions seriatim, and either to reform or recommit such report.[31]

Correction on Appeal.—Where there are errors and defects apparent upon the face of a report of a commissioner, the appellate court will correct such errors and defects, if there be such facts in the record as will enable the court to do so, and to render a decree; but if such facts are not in the record, as to enable the court to amend, and render a proper decree, it will reverse the decree, and remand the cause, with instructions, to the circuit court, to cause a proper account to be taken.[32] Where the accounts have been discussed, for a long time, in the court of chancery before and after the appeal; and have become intricate from the manner of stating them; if a bill of review be applied for to the last decree of the court of chancery, purporting to be made, in conformity to the decree of the court of appeals, and leave to file the bill be refused, the court of appeals will correct what is erroneous in the report of the commissioner, acting under its own decree, and affirm the residue, in order to prevent further delay, although the affirmance may possibly be injurious in some instances.[33]

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30. Dewing *v.* Hutton, 40 W. Va. 521, 21 S. E. 780.
31. Holt *v.* Holt, 46 W. Va. 397, 35 S. E. 19.
32. Boggs *v.* Johnson, 9 W. Va. 434.
33. Cary *v.* Macon, 4 Call 605.

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